2000

F. Stanley Nielsen v. Reed L Petersen Investment Company, Ethel Petersen, Curtis Petersen, Robert Petersen, Dixie Jackson, Mayme Petersen, Betty Russell, Louise Harbinson, Lavern H Petersen and Percy E Petersen : Brief of Appellant

Utah Court of Appeals

Robert L. Froerer; Daniel L. Hawkley; Counsel for Appellant.
David J. Knowlton; Counsel for Respondent.

IN THE UTAH COURT OF APPEALS

F STANLEY NIELSEN,

Plaintiff and Appellant,

vs

REED L PETERSEN INVESTMENT COMPANY, a Utah Partnership, ETHEL PETERSEN, general partner, CURTIS PETERSEN, ROBERT PETERSEN, DIXIE JACKSON, Limited Partners, and MAYME PETERSEN and their successors in interest, BETTY RUSSELL and LOUISE HARBINSON, LAVERN H PETERSEN and PERCY E PETERSEN,

Defendants and Appellees

APPELLANT'S BRIEF

Case No 20000259-CA

Priority – 15

APPEAL
from the
District Court of the Second Judicial District
Weber County, State of Utah

Honorable Parley R Baldwin

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IN THE UTAH COURT OF APPEALS

F. STANLEY NIELSEN, Plaintiff and Appellant, vs REED L. PETERSEN INVESTMENT COMPANY, a Utah Partnership, ETHEL PETERSEN, general partner; CURTIS PETERSEN, ROBERT PETERSEN, DIXIE JACKSON, Limited Partners; and MAYME PETERSEN and their successors in interest, BETTY RUSSELL and LOUISE HARBINSON, LAVERN H. PETERSEN and PERCY E. PETERSEN, Defendants and Appellees.	APPELLANT'S BRIEF Case No. 20000259-CA Priority – 15

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This is an appeal from an Order Granting Summary Judgment Against Plaintiff entered by the District Court of Weber County, Ogden Department, State of Utah, transferred to the Court of Appeals by the Supreme Court.

ISSUE PRESENTED FOR REVIEW

In determining a motion to dismiss brought pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, when matters outside the pleading are presented, is the trial court at liberty to limit its consideration of the matters presented outside the pleadings to those presented by the defendant and to decide the motion in manner other than the manner prescribed by said Rule?

STANDARD OF REVIEW

"A judge shall dispose of all judicial matters promptly, efficiently, and fairly" (CJA, Chapter 12, Code of Judicial Conduct, Canon 3B(8)).

(1) Rule 12(b)(6) Motion to Dismiss.

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Utah R.Civ.P. 12(b)(6))

(2) Summary Judgment

> Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). In reviewing a motion for summary judgment, this court considers "all of the facts and evidence presented, and every reasonable inference arising therefrom, in a light most favorable to the party opposing the motion." *Katzenberger v. State*, 735 P.2d 405, 408 (Utah App. 1987). Further, because summary judgment presents only questions of law, this court accords no deference to the trial court's ruling

and reviews it for correctness. *Estate of Covington v. Josephson*, 888 P.2d 675 (Ut. Ct. App. 1994).

STATEMENT OF GROUNDS FOR SEEKING REVIEW

Canon 3B(8) of the Utah Code of Judicial Conduct provides that "[a] judge shall dispose of all judicial matters promptly, efficiently, and fairly" (CJA, Chapter 12, Code of Judicial Conduct, Canon 3B(8)). In accordance with the terminology section of said Code, "'[s]hall' and 'shall not' impose binding obligations to respectively engage in or refrain from the described conduct." This appeal is based on the trial judge's failure to dispose of all judicial matters promptly, efficiently and fairly in this case.

There is no record of Stan Nielsen objecting to the exhibits in support of motion to dismiss (Record, pages 133-164) because those exhibits were made relevant by the second amended complaint filed on October 15, 2000 (Record, pages 170-176). On January 31, 2000, the trial judge disallowed the amended complaint (Record, page 261) and in doing so, rendered the exhibits in support of motion to dismiss (Record, pages 133-164) irrelevant.

Stan Nielsen objected "to the Court giving any consideration to any statement made by the attorney representing Curtis Petersen that [was] not supported by an affidavit or other relevant document before the Court. Every contention of fact made during the defense counsel's argument [fell] within the scope of [that] objection." (Record, pages 179-180).

RULES OF CENTRAL IMPORTANCE TO THE APPEAL

Utah Code of Judicial Administration
Chapter 12
Canon 3(B)(8)

"A judge shall dispose of all judicial matters promptly, efficiently, and fairly"

Utah Rule of Civil Procedure 12(b)

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Utah Rule of Civil Procedure 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Utah Code of Judicial Administration, Rule 4-501. Motions.

(1) Filing and service of motions and memoranda.

(a) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) Memorandum in opposition to motion. The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting

documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) Reply memorandum. The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

* * *

(2) Motions for summary judgment.

(a) Memorandum in support of a motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(a) A decision on a motion shall be rendered without a hearing unless ordered by the court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

STATEMENT OF THE CASE

Two causes of action comprise this case. The first is a breach of contract claim that arose in 1997 seeking damages in the amount of $1,430,011.33 (Record, pages 16-17). The second is a malicious prosecution claim that matured in July, 1999, seeking judgment against the defendants in the amount of $24,500 (Record, page 174). Stan Nielsen filed the original complaint on January 19, 1999 (Record, pages 1-12), and filed an amended complaint on February 26, 1999 (Record, pages 14-25).

On March 1, 1999, Curtis Petersen, one of the defendants (Record, page 1), filed a "Hearing Requested-Motion to Dismiss and/or in the Alternative Motion for More Definite Statement & Sanctions" (Record, pages 26-31). Neither a memorandum nor an affidavit was filed in support of Curtis Petersen's motion, however, four documents from an Idaho court were attached to the motion (Record, pages 32-58). On August 11, 1999, Curtis Petersen filed a request to submit for decision (Record, pages 59-60).

On August 23, 1999, Stan Nielsen filed a motion for summary judgment (Record, pages 63-64), a memorandum in support of his motion for summary judgment (Record, pages 69-71), an affidavit in support of the motion for summary judgment (Record, pages 72-75) with supporting documents attached (Record, pages 76-88), and a memorandum in opposition to Curtis Petersen's motion to dismiss (Record, pages 89-92).

On August 26, 1999, Curtis Petersen filed a "Memorandum in Opposition to Summary Judgment and in Support of Motion to Dismiss" (Record, pages 93-104) together with the affidavit of Philip C. Patterson (105-106). Stan Nielsen filed a reply memorandum on September 2, 1999 (Record, pages 109-117).

On October 12, 1999, Curtis Peterson filed exhibits in support of motion to dismiss (Record, pages 133-164). On October 13, 1999, Curtis Petersen filed the Affidavit of F. Randall Kline (Record, pages 165-168).

On October 14, 1999, the trial court held a hearing "by profer" (sic). (Record, page 169).

On October 28, 1999, Stan Nielsen filed a memorandum in response to matters and documents raised in oral argument on the motion to dismiss (Record, pages 179-187).

On November 19, 1999, Robert L. Petersen filed an answer "to plaintiff's complaint and/or amended complaint..." (Record, page 235).

On December 14, 1999, Robert L. Petersen and Curtis Petersen filed a "supplemental answer" (R. pages 259-260).

On January 31, 2000, the trial judge disallowed the filing of the amended complaint that had been filed on October 15, 2000, and entered a Ruling granting Curtis Petersen's motion to dismiss and denying Stan Nielsen's motion for summary judgment. On February 25, 2000, the trial court entered an order granting summary judgment against the plaintiff.

On March 24, 2000, Stan Nielsen filed his notice of appeal (Record, pages 270-272).

SUMMARY OF ARGUMENTS

The trial court did not dispose of Curtis Petersen's motion to dismiss promptly, efficiently, and fairly.

a. Promptly is interpreted to mean on time or punctual. Having a motion to dismiss under advisement for 109 days is not prompt disposal of the matter.

b. Efficiently is interpreted to mean with a minimum of waste, expense, or unnecessary effort. Holding a hearing by proffer was a waste of time that resulted. Disallowing an amendment of the complaint 108 days after it was filed resulted in waste, and ignoring the issues framed by the pleadings and the motion to dismiss resulted in unnecessary efforts for the trial judge and the parties.

c. Fairly is interpreted to mean consistent with rules, logic or ethics. The trial judge did not decide Curtis Petersen's motion to dismiss in accordance with the rules that govern such a motion when matters outside the record are presented. The motion was not accompanied by an memorandum and it was not supported by affidavits or other supporting evidence. When the trial judged substituted pleadings and proof with proffers, promptness, efficiency, and fairness were forfeited.

d. It was unfair (not in accordance with the rules) for the trial judge to rely exclusively on matters other than the pleadings and affidavits in disposing of Curtis Petersen's motion to dismiss. Utah R.Civ.P. 56(c) limits what the court can consider to the pleadings and affidavits properly before it. In this case, the trial judge relied on everything except the pleadings and affidavits.

e. The trial judge substituted proffers for pleading and proof, thereby forfeiting promptness, efficiency, and fairness. He compromised his judicial responsibilities by making himself and advocate for the defense. His findings of fact are not supported by the record.

ARGUMENT

THE TRIAL JUDGE DID NOT DISPOSE OF CURTIS PETERSEN'S MOTION TO DISMISS PROMPTLY, EFFICIENTLY, AND FAIRLY.

a. The trial judge did not dispose of Curtis Petersen's motion to dismiss promptly.

"Promptly" is interpreted to mean "[o]n time, punctual," American Heritage Publishing Co., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (1971).

The trial judge decided Curtis Petersen's motion to dismiss on January 31, 2000, 109 days after the hearing on the motion (Record, page 261). CJA Rule 3-104(3)(L) suggests that any case or issue held by a judge for more than 60 days has not been decided promptly. Disallowing an amended complaint that was filed without leave of the court to remain filed for 108 days was neither prompt nor efficient.

b. The trial judge did not dispose of Curtis Petersen's motion to dismiss efficiently.

"Efficiently" is interpreted to mean "[w]ith a minimum of waste, expense, or unnecessary effort..." American Heritage Publishing Co., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (1971).

On October 14, 2000, the trial court held a hearing "by profer" (sic) (Record, page 169). Utah R.Civ.P. 56(c) permits entry of summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Nothing permits the court to enter summary judgment on the basis of proffers instead of affidavits that conform to the requirements of Utah R.Civ.P. 56(e) and for that reason, holding a hearing by proffer is

wasteful. As hereinafter discussed in greater detail, the waste was compounded when the trial judge considered evidence not relevant to any of the issues raised by Curtis Petersen's motion to dismiss (Record, pages 261-266).

c. The trial judge did not dispose of Curtis Petersen's motion to dismiss fairly.

"Fairly" is interpreted to mean "[c]onsistent with rules, logic, or ethics," American Heritage Publishing Co., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (1971). The rules governing the disposal of the motion to dismiss brought by Curtis Petersen are unambiguous.

Curtis Petersen's motion to dismiss was based on Rule 12(b)(6) of the Utah Rules of Civil Procedure (Record, page 26). Four documents were annexed to the motion (Record, pages 28, 32-58). Rule 12(b) provides in pertinent part that:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56(c) of the Utah Rules of Civil Procedure provides that:

> (c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CJA 4-501 provides, in pertinent part, that:

> (1) Filing and service of motions and memoranda.
>
> (a) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page

> number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion.
>
> * * *
>
> (2) Motions for summary judgment.
>
> (a) Memorandum in support of a motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

Curtis Petersen's motion to dismiss was not "accompanied by a memorandum of points and authorities, appropriate affidavits, **and** copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion" as required by CJA 4-501(1)(a). There being no memorandum, there was no "section that [contained] a concise statement of material facts as to which [defendants contended] no genuine issue [existed]" as required by CJA 4-501(2)(a). There being no affidavit(s), the motion was not supported as required by Utah R.Civ.P. 56(e).

When Curtis Petersen filed a request to submit for decision (Record, pages 59-60), the trial judges obligation to dispose of the motion promptly, efficiently, and fairly dictated dismissal of the motion because the motion had not been made and supported as provided in the above-quoted rules.

Two days before the hearing on the motion to dismiss, Curtis Petersen filed 2 exhibits in support of his motion to dismiss (Record, pages 133-164). The day before the hearing, Curtis Petersen filed the Affidavit of F. Randall Kline (Record, pages 165-168). There is nothing in the record indicating that Stan Nielsen was provided with a copy of the Affidavit of F. Randall Kline prior to the hearing. In any event, following the hearing

"by proffer," Stan Nielsen filed an amended complaint (Record, 170-176) so as to define the issues arising from the 2 exhibits filed two days earlier (Record, pages 133-164). The facts evidenced by those exhibits were not relevant to any issue of fact raised by Curtis Petersen's motion to dismiss. When the trial judge decided to disallow the amended complaint 108 days after the amended complaint was filed, fairness and Utah Rule of Evidence 402 (evidence that is not relevent is not admissible) dictated that the trial judge also disallow the exhibits that had also been filed without leave of the court.

d. The trial judge relied exclusively on matters other than the pleadings and affidavits in disposing of Curtis Petersen's motion to dismiss.

Rule 56(c) provides that after a motion for summary judgment has been "filed and served in accordance with CJA 4-501 ... [t]he judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The pleadings gave rise to the following issues of fact:

> 1. Defendants are the owners of certain real property hereinafter referred to as the Petersen Farm.
>
> 2. On October 22, 1986, an Order Approving Transfer of Property was entered by United States Bankruptcy Court for the District of Utah Central Division, Bankruptcy No. 86 00700, whereby a contract purchase interest in the Petersen Farm was converted to an irrevocable option to purchase the Petersen Farm. A copy of said Order is attached hereto as Attachment 1 and incorporated herein as if set forth in full. A copy of the option is attached hereto as Attachment 2 and incorporated herein as if set forth in full.
>
> 3. Plaintiff is a resident of Weber County, Utah, and the owner of the irrevocable option to purchase the Petersen Farm.
>
> 4. The individually named Defendants are residents of the State of Utah, and the partnerships named as defendants are Utah partnerships. The

Defendants are the grantors of the option and successors in interest to the original grantors of the option. (Record, page 15).

5. When the option was bargained, sold, and granted by the Defendants, Defendants were to receive Conservation Reserve Program ("CRP") payments for ten years as consideration for the option.

6. Beginning in October 1987, Defendants received annual CRP payments, each in the amount of $73,508.00.

7. In 1996, Defendants negotiated a new CRP contract that provided for ten more annual CRP payments, each in the amount of $56,764.00.

8. On December 30, 1996, notice of Plaintiff's acceptance of their irrevocable offer to sell the Farm was mailed to the Defendants.

9. On January 9, 1997, defendants responded to plaintiff's acceptance of their irrevocable offer with a contention that their irrevocable offer had been revoked.

* * *

11. Plaintiff's acceptance of the defendants' irrevocable offer to sell the Farm created a bilateral contract for the sale of the farm between the plaintiff and the defendants.

12. Defendants' breached the contract by refusing to perform their obligations under the terms of the option contract.

13. When the Defendants' breached the contract, the Farm had an investment value of $1,637,285.08.

14. As a direct and proximate consequence of defendants' breach of contract, plaintiff has suffered damages as follows:

a. In January of 1997, plaintiff lost the net investment market value (investment market value – option cost) of the Farm; and

b. In October of 1997 and again in October of 1998, plaintiff lost income in the amount of $56,764. (Record, pages 15-16).

The defendant's answer asserts no affirmative defenses (Record, page 259).

Curtis Petersen's motion to dismiss was based on the following legal theories and contentions of fact:

(1) To be enforceable, any agreement that deals with an interest in land must be in writing and signed by the person to be charged. The agreement alleged in this case is not signed by Curtis Petersen (Record, page 27).

(2) "The claim of the plaintiff is barred by the doctrine of res adjudica or prior adjudication and/or collateral estoppel, in that the claims made in the instant case were similarly raised and fully litigated by the parties in ...[Onieda County, Idaho] Civil Case No. 7-874 . . . wherein the issues were all resolved in the favor of plaintiffs and against defendants...." (Record, page 27).

The Ruling made by the trial judge did not address the remaining contentions on which Curtis Petersen based his motion to dismiss.

Utah R.Civ.P. 56(e) makes it clear that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." As discussed above, Curtis Petersen's motion was not made and supported as provided in Utah R.Civ.P. 56. Therefore, Stan Nielsen was not obligated by the rule to respond. However, Stan Nielsen did respond by affidavit (Record, pages 72-88). A certified copy of a court document evidencing that Curtis Petersen is an owner of the property is attached thereto (Record, page 79). Viewing that evidence in a light most favorable to Stan Nielsen, as the trial judge claims he did (Record, page 263), there is a genuine issue as to privity, and summary judgment was inappropriate.

Further, the evidence that Curtis Petersen did not sign the agreement giving rise to the option is not evidence "... having any tendency to make the existence of any fact

that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (URE 401). In this case, the evidence that Curtis Petersen did not sign the agreement is not evidence having any tendency to make the allegations that Curtis Petersen is one of the owners of the farm and a successor in interest to the grantors more or less probable than those allegations would be without the evidence. As the evidence does not fall within the scope of "relevant evidence" defined by Rule 401 of the Utah Rules of Evidence, the fact evidenced thereby is not a material fact that shows the Curtis Petersen is entitled to judgment as a matter of law.

Curtis Petersen also contended that "the claims made in the instant case were similarly raised and fully litigated by the parties in ...[Onieda County, Idaho] Civil Case No. 7-874 . . . wherein the issues were all resolved in favor of the plaintiffs and against the defendants Nielsen." (Record, page 27). There is nothing in the record that shows that the claims made paragraphs 1-6 of the complaint in the instant case (Record, pages 14-15) were similarly raised and fully litigated by the parties in that case, and that the plaintiffs in that case prevailed on those claims. The claims asserted in paragraphs 7-14 of the complaint in this case (Record, pages 15-16) could not have been "similarly raised and fully litigated by the parties in Civil Case No. 7-874" (Record, page 27) because those claims did not mature before the ten annual CRP payments totaling $735,080 had been received and the original ten-year CRP contract had been terminated (Record, page 22). Because the breach of contract claim made in this case did not mature until January of 1997, the claim could not have been brought in Civil Case No. 7-874 and res judicata does not apply.

e. The trial judge substituted proffers for pleadings and proof, thereby forfeiting promptness, efficiency, and fairness.

By ignoring the issues raised by Curtis Petersen in his motion to dismiss and Curtis Petersen's waiver of all affirmative defenses, including res judicata, the trial judge compromised his judicial responsibilities by making himself an advocate for the defense. That was the role assumed when the trial judge invented a res judicata defense to the malicious prosecution claim (Record, page 265) and, without giving Stan Nielsen notice of said defense and an opportunity to respond to it, the trial judge granted summary judgment against Stan Nielsen because he "[failed] to propose any valid justification why the doctrine of *res judicata* would not [bar] his malicious prosecution claim. Further, there is nothing in the record that supports the trial judge's finding that "[t]he issue of any impropriety with the slander suit have already been dealt with by a foreign court...." (Record, page 265).

He also assumed the role of advocate for the defense with regard to the breach of contract claim. Curtis Petersen and Robert L. Petersen waived all affirmative defenses (Record, page 259, Utah R.Civ.P. 8(c)). The trial judge ignored their waiver and took 109 days creating affirmative defenses on their behalf. In doing so, he breached his obligation to dispose of the judicial matter before him promptly, efficiently, and fairly. (CJA, Chapter 12, Code of Judicial Conduct, Canon 3B(8)).

The record does not support the affirmative defenses he created. Specifically:

(1) There is nothing in the record that supports the trial judge's finding that the claim that an option for which $735,080 was paid as consideration is irrevocable (Record, p. 15) was fully and fairly litigated in a prior case between

the parties in this case and decided in Curtis Petersen's favor (Record, page 264); and

(2) There is nothing in the record that supports the trial judge's finding that the claim that an Order Approving Transfer of Property was entered by the United States Bankruptcy Court for the District of Utah Central Division whereby a contract purchase interest in the Petersen Farm was converted to an irrevocable interest to purchase the Petersen Farm (Record, page 15) was fully and fairly litigated in a prior case between the parties in this case and decided in Curtis Petersen's favor (Record, page 264).

CONCLUSION

WHEREFORE, the Order Granting Summary Judgment Against the Plaintiff should be set aside and this case should be remanded to the District Court for further proceedings.

Dated this 2nd day of November, 2000.

Daniel L. Hawkley

CERTIFICATE OF SERVICE

I certify that on this 2nd day of November, 2000, a copy of the foregoing document was mailed, postage prepaid, to each of the following:

David J. Knowlton
Attorney at Law
427 – 27th Street
Ogden, Utah 84401

Daniel L. Hawkley

ADDENDUM

No addendum is necessary.